CARMEL MARY SOOSAI

v.

JOSEPHINE LOURDASAMY RATNAVATHY R. SOOSAI & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[ORIGINATING SUMMONS NO. F 513 OF 1984]
23 OCTOBER 1987

PROBATE AND ADMINISTRATION: *Succession - Will - Petitioner (deceased's wife) named sole executrix and trustee of will - Residue of deceased's real and personal estate left to petitioner to the exclusion of caveators - Whether will executed in manner as laid down in s. 5 of Wills Ordinance 1959.*

PROBATE AND ADMINISTRATION: *Succession - Caveat - Petitioner's step-children filed caveats - Objection to petitioner's application for probate - Grounds of objection - Will not voluntarily executed by deceased - Petitioner exercised undue influence over deceased - Proof of undue influence - Question of testamentary capacity - Whether deceased's last will and testament - Proof of subsequent will - Whether caveators to pay costs of proceedings personally or out of estate.*

In this case, the petitioner was the wife of R. Soosai (deceased) who died testate on 14 April 1983 naming her the sole executrix and trustee of his will and left her the residue of his real and personal estate to the exclusion of the caveators, his children by a previous marriage.

However, five of the petitioner's step-children have filed caveats against her petition for probate. The caveators have challenged the deceased's last will and testament dated 19 October 1982 for the following grounds:

1. it was not voluntarily executed by the deceased as the petitioner had exercised undue influence over him;
2. because of his ill-health the deceased lacked testamentary capacity;
3. it is not the deceased's last will and testament;
4. there is a condition precedent expressed in the will that renders it defective.

Held:

[1] To establish undue influence sufficient to invalidate the deceased's will the caveators must show that the petitioner coerced the deceased into executing the Will in the form that it had taken or to express it another way the will was not the voluntary act of the deceased. The coercion exercised may take the form of any pressure of whatsoever character. On weighing all the evidence in its totality, the caveators had failed to prove their allegation of undue influence as to render the will the involuntarily act of the deceased.

[2] On the due consideration of all the evidence pertaining to the deceased's mental capacity, the opinion of DW7, a psychiatrist, who never saw or examined the deceased, cannot carry any weight especially when he generalised a diabetic as follows: "Every person who suffers diabetes suffers mental incapacity."

[3] Since the caveators have alleged the existence of a later will revoking the one that is being challenged by them, the only answer to such an allegation is for them to produce this later will and since they have not been able to do so since 19 April 1983, the Court can only conclude that there is no later will and the deceased's will dated 19 October 1982 is his last will and testament.

[4] As all the caveators' objections to the deceased's will have been proved to be unfounded, an order was made that probate of the deceased's will dated 19 October 1982 be granted to the petitioner as the executrix and trustee named in the will.

[Probate of the will was ordered to be granted to the petitioner as the sole executrix and trustee. The caveators were ordered to pay the costs of these proceedings and also of the proceedings for the limited grant of Letters of Administration.]

Cases referred to:
Wingrove v. Wingrove & Ors. [1886] 11 P 81
Spiers v. English [1907] P 122
In re Cutcliffe's Estate [1959] P 6

Legislation referred to:
Inheritance (Family Provision) Act 1971, s. 3
Wills Ordinance 1959, s. 5

Other source referred to:
Halsbury's Laws of England, 4th Edn., Vol. 17, p. 1

For the petitioner - T. Thomas (S.K. Lim with him); M/s. Skrine & Co.
For all the caveators - G.T. Rajan; M/s. G.T. Rajan & Co.

JUDGMENT

Siti Norma Yaakob J:

In this contested probate suit, the petitioner was the wife of R. Soosai (deceased), who died testate on 14 April 1983, naming her the sole executrix and trustee of his will and leaving her the residue of his real and personal estate to the exclusion of the caveators, his children by a previous marriage.

The deceased's first wife died on 24 November 1947, leaving behind 8 children, 5 boys and 3 girls, surviving her, the youngest, Thomas, being only a year old. The deceased was then 42 and 2 years later, he married the petitioner and she in turn bore him 4 children, 1 boy and 3 girls. These 4 children have also been named by the deceased in his will as being the ultimate beneficiaries in the event the petitioner predeceased him.

Five of the petitioner's step-children have filed caveats against her petition for probate and their Counsel has indicated that 2 of the remaining 3 children will subsequently follow suit, leaving Thomas, the youngest of the deceased's children by his first marriage, to be the only step-child not objecting to the petitioner's application for probate.

The deceased's last will and testament dated 19 October 1982 is challenged by the caveators for the following grounds:

(1) It was not voluntarily executed by the deceased as the petitioner had exercised undue influence over him.

(2) Because of his ill-health, the deceased lacked testamentary capacity.

(3) It is not the deceased's last will and testament.

(4) There is a condition precedent expressed in the will that renders it defective.

To establish undue influence sufficient to invalidate the deceased's will, the caveators must show that the petitioner coerced the deceased into executing the will in the form that it had taken or to express it in another way the will was not the voluntary act of the deceased. The

coercion exercised may take the form of any pressure of whatsoever character. In *Wingrove v. Wingrove & Ors* [1886] 11 P 81, it was held that "only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence."

The relationship of a person who is alleged to have exercised unbounded influence over another does not raise a presumption of undue influence sufficient to vitiate a will (see *Halsbury's Laws of England*, 4th Edn., Vol. 17, p. 1). Thus the fact that the petitioner was the wife of the deceased at the time the Will was executed, does not in itself raise the presumption that she had unduly influenced him into executing his will. This was clearly stressed in *Wingrove v. Wingrove & Ors.* above, when the Court held that

> it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in a particular case that power was exercised, and that it was by means of the exercise of that power, that the will such as it is, has been produced.

Proof of undue influence in this case came in the form of affidavit and oral evidence and to consider whether the caveators had discharged the burden of proof, it is necessary that I look into the circumstances leading to the execution of the will.

In their 4 affidavits alleging undue influence in encl. 24A, 42, 48 and 92 the caveators averred to general statements that the petitioner had unduly influenced their father into executing the will in the form it had taken. They, however, have not identified the coercion or pressure that had been practised by the petitioner over the deceased leading to the execution of the Will and neither have they alluded to particulars or facts on which pressure can be concluded. The fact that the deceased had been dependent on the petitioner for his needs and well being, particularly during the last 16 years before his death when all his children by his two marriages had left the matrimonial home to lead their own lives, does not in itself amount to proof that she had unduly influenced his free will. On the contrary, there was undisputed evidence that she never gave any instructions to Mr. Peddie, PW1, the solicitor who drew up the will, and neither was she present when the deceased executed the will. This lends support to her testimony that she knew nothing of the existence of her husband's will until it was read by PW1, 4 days after the funeral.

Evidence from 2 of the caveators, DW1 and DW8 merely show that the petitioner had every opportunity to exercise her own will over their father, which I consider is understandable for she was after all his wife but beyond that they were not able to testify how she had coerced their father into executing the will. From their evidence all they had succeeded in doing was to portray the petitioner as a calculating and greedy woman whose aim in marrying the deceased was to deprive her step-children not only the love of their own father but also benefits that they would have been entitled to had their own mother been alive. When pressed how she had coerced the deceased into executing the will, DW1 frankly admitted as follows:

> I was not present when my father made his will. I cannot support my thinking with any fact to show that the petitioner coerced my father to make the will.

From this admission and weighing all the evidence in its totality, it is my considered opinion that the caveators had failed to prove their allegation of undue influence as to render the Will involuntarily act of the deceased. I fully sympathise with the caveators for having been left out completely of their father's will but in this respect, the Court cannot assist them in any way as a testator has absolute testamentary freedom to leave his property to anybody he chooses, the only exception being s. 3 of the Inheritance (Family Provisions) Act 1971,

that allows a category of persons who have been dependent on the testator and who have been left out of his will to apply for reasonable maintenance. Unfortunately, neither of the caveators qualify under s. 3.

I now turn to the next allegation raised by the caveators, i.e., the deceased's lack of testamentary capacity due to ill-health.

It is not disputed that at the time of his death, the deceased was a chronic diabetic. He had already lost sight of his left eye and was slowly losing sight of the other. The medical evidence shows that he had been a chronic diabetic for at least 5 years before his death and this had led to his undergoing an operation on 9 January 1982 to remove his prostate gland. Prior to that, on 27 November 1981, he had also undergone a cataract operation to correct his eye but this operation turned out to be unsuccessful as he had an irreversible damaged optic nerve which was already there before the operation. DW6, who provided the follow-up treatment after the operation, did not rule out of the possibility that the deceased's chronic diabetic condition could have caused the blindness to his left eye.

The 3 doctors who examined and treated him of his various ailments, DW4 for his diabetes, DW5 who performed the prostate gland operation and DW6 who did the follow-up treatment of his left eye, all agreed that they were not competent to testify to the deceased's mental capacity during the period the will was executed as they have no professional qualifications. However, a psychiatrist of 28 years' standing, DW7, was more than prepared to testify that every person who suffers diabetes suffers mental incapacity. The most significant aspect of DW7's evidence is that he never saw or examined the deceased, and that his conclusion was based largely on his vast experience in the field of psychiatric medicine and on the medical reports of DW4, DW5 and DW6 who examined and treated the deceased during the relevant period.

The deceased was an accountant and he managed his own firm, assisted by 3 employees who were not professionals. There is also evidence to show that during the period of ill-health, apart from the time when the deceased had to be hospitalised and after his 2 operations, followed by a period of recovery, he continued working in his office, keeping to his regular hours from 10.00 a.m until 5.00 p.m. with a break for lunch. He continued doing so up to the day before his death.

PW1, the solicitor who managed the deceased's legal affairs for 20 years and who drew up the deceased's two wills that were subsequently revoked by the one which is being challenged by the caveators, testified that he saw the deceased for the last time on 28 March 1983, almost 2 weeks before his death. The purpose of that visit was to instruct PW1 to sell a piece of land and when conversing with him PW1 did not detect anything unusual or peculiar about the deceased's behaviour or mannerism as to give any reason to believe that his mental capacity was in any way impaired. I am aware that PW1 is no doctor but all the same I have no reason to doubt PW1's evidence on this for after all he had known and had dealings with the deceased for good 20 years.

On the due consideration of all evidence pertaining to the deceased's mental capacity, the opinion of DW7, who never saw or examined the deceased, cannot carry any weight especially when he generalised a diabetic as follows:

> Every person who suffers diabetes suffers mental incapacity. Generally the brain is affected. About 31.2% of Singapore's population is affected by diabetes.

The caveators' other allegation that the will was not the deceased's last will and testament stemmed from a statement made by PW1 at the reading of the will on 18 April 1983 of the possibility of the deceased having executed another will before another solicitor. To confirm this possibility, the petitioner, accompanied by her 3 children and 2 step-children, (one being DW8), went to the Chartered bank to check the deposit box which had been operated in the joint names of her husband and herself. She emptied the contents of the box into a plastic bag upon reaching home the plastic bag was found to contain amongst other things, a sealed brown envelope which DW8 opened to reveal a copy of the present will that is being challenged. This evidence tallies with P38 wherein PW3, one of the attesting witnesses had noted on 19 October 1982, the day the will was executed, that the deceased had taken away the signed, duplicate copy of the will to be placed in his bank.

Since the caveators have alleged the existence of a later will revoking the one that is being challenged by them, I consider that the only answer to such an allegation is for them to produce this later will and since they have not been able to do since 19 April 1983, I can only conclude that there is no later will and that the deceased's will dated 19 October 1982 is his last will and testament.

The caveators also took exception to the time limit of 1 month mentioned in Clause 4 of the will as being a condition precedent rendering the will defective. I do not consider there is any merit to this objection as the 1 month period is nothing more than a saving provision in the unlikely event that both the testator and executrix should die at the same time. This time provision has nothing to do with the legality of the will which from the evidence of PW1, PW2 and PW3 has clearly shown to have been executed in the manner as laid down in s. 5 of the Wills Ordinance 1959.

As all the caveator's objections to the deceased's will have been proved to be unfounded, I accordingly order that probate of the deceased's will dated 19 October 1982 be granted to the petitioner, as the executrix and trustee named in the Will.

As the petitioner has succeeded in her petition, it also follows that she is entitled to the costs of these proceedings but in a probate suit such costs can be borne by either the estate or by the caveators personally.

In *Spiers v. English* [1907] P 122, the facts of which were somewhat similar to the facts of this case before me, the plaintiff, as the lawful nephew and next-of-kin of Charlotte Spiers, deceased, claimed revocation of probate obtained by the defendant on the ground that the purported execution of the will was obtained by the undue influence of the defendant. When dealing with the question of costs, the President of the Court had this to say.

> In deciding questions of costs one has to go back to the principles which govern cases of this kind. One of those principles is that if a person who makes a Will or persons who are interested in the residue have been really the cause of the litigation a case is made out for costs to come out of the estate. Another principle is that, if the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them. If it were not for the application of those principles, which, if not exhaustive, are the two great principles upon which the Court acts, costs would now, according to the rule, follow the event as a matter of course. Those principles allow good cause to be shown why costs should not follow the event. Therefore, in each case where an application is made, the Court has to consider whether the facts warrant either of those principles being brought into operation.

On undue influence the President had this to say,

> ... a plea of undue influence ought never to be put forward unless the party who pleads it has reasonable grounds upon which to support it.

Since the plaintiff had failed to prove undue influence, the President did not consider it justifiable to interfere with the ordinary rule that costs follow the event and accordingly ordered that the plaintiff bear the costs personally.

The same principles were followed in the later case of In *re Cutcliffe's Estate* [1959] P. 6, where the Court of Appeal held that

> where pleas of undue influence and pleas of fraud are made, the probability at any rate, if they are unsuccessfully made, is that the people who make such charges and fail, Will be condemned in the costs not only of that charge but of the whole action.

Based on the principles enunciated by these 2 English cases, I accordingly order that the caveators pay the costs of these proceedings personally as well as the costs in proceedings relating to an application for a limited grant of Letters of Administration of the estate of the deceased which became necessary in order to facilitate the collection of the liquid assets of the estate for the purpose of settling the estate duty payable. That application was granted by Chan J on 9 June 1984 but he however reserved the question of costs to be paid to the petitioner.

Accordingly I make the following orders:

1. Probate of the will dated 19 October 1982 be granted to the petitioner as the sole executrix and trustee.
2. The caveators to pay the costs of these proceedings as well as to the proceedings relating to the granting of the order of Court dated 9 June 1984.

Also found at [1987] 2 CLJ 426